

## EXPLORING THE PURPOSES OF SECTION 75(V) OF THE *CONSTITUTION*

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### I INTRODUCTION

There is a familiar story told about section 75(v) of the Constitution. The story starts with the famous United States case of *Marbury v Madison*,<sup>1</sup> where the Supreme Court held that it did not have jurisdiction to grant an order of mandamus directed to the Secretary of State, James Madison, to enforce the delivery of a judicial commission to William Marbury.

The story continues that when Andrew Inglis Clark, who was a delegate to the 1891 Constitutional Convention, sat down to draft a constitution to be distributed to the other delegates before the Convention started, he included a provision that was to be the forerunner of section 75(v). The insertion of that provision, it is said, was intended to rectify what he saw to be a flaw in the United States Constitution exposed by the decision in *Marbury v Madison*. There was little discussion about the clause during the 1891 Convention, and it formed part of the 1891 draft constitution.

The provision also found a place in the drafts adopted during the Adelaide and Sydney sessions of the 1897-8 Convention. However, by the time of the Melbourne session of that Convention in 1898, with Inglis Clark not a delegate, no one could remember what the provision was there for and it was struck out.

Following developments from Tasmania, Inglis Clark sent a telegram to Edmund Barton, the leader of the Convention, presumably requesting the reinstatement of the provision. As is now well known, in his reply, Barton said:

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1 5 US 137 (1803).

I have to thank you further for your telegram as to the striking out of the power given to the High Court to deal with cases of mandamus and prohibition against officers of the Commonwealth. None of us here had read the case mentioned by you of *Marbury v Madison* or if seen it has been forgotten. It seems however to be a leading case. I have given notice to restore the words on the reconsideration of the clause.<sup>2</sup>

The provision was then reinserted, and what were to be the final words on the provision before the debate ended, Barton said:

This provision is applicable to those three special classes of cases in which public officers can be dealt with, and in which it is necessary that they should be dealt with, so that the High Court may exercise its function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution.<sup>3</sup>

This purpose, which will be referred to later in this article as an *accountability* purpose, has been taken on by the High Court. In *Bank of New South Wales v Commonwealth* ('*Bank Nationalisation Case*') Dixon J said that the inclusion of section 75(v) was 'to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power.'<sup>4</sup> More recently, in *Plaintiff S157/2002 v Commonwealth*, having referred to Justice Dixon's statement, five members of the Court said:

The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction.<sup>5</sup>

In this way, the Court said, section 75(v) introduced 'into the Constitution of the Commonwealth an entrenched minimum provision of judicial review'.<sup>6</sup> Six members of the Court then adopted these passages in *Bodruddaza v Minister for Immigration and Multicultural Affairs*.<sup>7</sup>

That, then, is the usual story. Section 75(v) is a provision that serves an *accountability* function. It was included in Chapter III of the Constitution to ensure that the High Court has jurisdiction to hold Commonwealth officers to account.

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2 John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 846.

3 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1885. (1948) 76 CLR 1, 363.

4 (2003) 211 CLR 467, 513–14 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

5 *Ibid* 513.

6 (2007) 228 CLR 651, 668–9 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ). See also *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14, 27 ('*Plaintiff M61*'); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 614 (Gleeson CJ, Gummow and Hayne JJ) ('*MZXOT*').

The primary aim of this article is to explain that this usual story of section 75(v) is only part of the story, and that to focus exclusively on the accountability function may, on occasion, lead us astray. The drafting history of section 75(v) reveals a much more complicated picture of the reasons for its inclusion. The article will then consider how this more complicated understanding of the drafting history impacts on four issues arising from the operation of section 75(v):

- (i) the relationship between section 75(iii) and (v);
- (ii) the meaning of the expression ‘officer of the Commonwealth’ in section 75(v);
- (iii) the existence of state jurisdiction to order writs against federal officers; and
- (iv) the minimum provision of judicial review entrenched by section 75(v).

## II THE MULTIPLE PURPOSES OF SECTION 75(V)

As indicated, the usual story set out above as to the purpose of section 75(v) is only part of the story. There were four main contributors to the historical development of the forerunners to section 75(v): Inglis Clark, Barton, Isaac Isaacs and Josiah Symon. As will be seen, each delegate made an important and distinct contribution to the development of what is now section 75(v).

In reassessing the drafting history of section 75(v), three main points will be emphasised. The first is that Inglis Clark did not have an *accountability* purpose in mind when he introduced the provision into the Constitution. No doubt he thought the Court would have the function of judicial review, but his forerunner to section 75(v) was not designed to give effect to that accountability purpose. Instead, Inglis Clark’s motivating concern was one of *distribution* or *allocation* of jurisdiction between original and appellate jurisdiction, a design that was only fully appreciated by Isaacs. The second point is that Barton, who advanced the *accountability* purpose of section 75(v), did so very late in the debate, having reintroduced the relevant clauses in response to Inglis Clark’s concerns about jurisdictional *allocation*. The third point that will be emphasised is that the Convention Debates reveal another purpose for section 75(v) that sees it operating to protect the Commonwealth government and its officers from state judicial power. This *federalist* understanding of section 75(v) was as equally prevalent during the Convention Debates as the now popular accountability purpose that protects the individual from an exercise of Commonwealth executive power.

As will be explained, these three distinct understandings of section 75(v) – jurisdiction allocation, accountability and federalist – were disguised by the drafting history of the relevant Chapter III clauses, but are revealed by a close

consideration of the Convention Debates alongside the successive drafts of the Constitution.<sup>8</sup>

### A Allocation/Distribution of Jurisdiction

To understand what Inglis Clark was trying to achieve, it is necessary to look more closely at what *Marbury v Madison* actually decided. It is important to start with the judicial provisions in the United States Constitution. Article III, section 2, paragraph 1 provides that ‘the judicial Power [of the United States] shall extend to’ an enumerated list of cases and controversies including: ‘all Cases, in Law and Equity, arising under ... the Laws of the United States’; ‘all Cases affecting Ambassadors, other public Ministers and Consuls’; ‘Controversies to which the United States shall be a party’; and ‘Controversies between two or more States; [and] between a State and Citizens of another State’.

Paragraph 2 of Article III, section 2 then continues:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

As can be seen, the two items identified in the second paragraph are categories of cases or controversies covered in the first paragraph.

When *Marbury* sought relief by way of mandamus against Madison in the United States Supreme Court, the Court had to consider whether it had jurisdiction to hear the claim. Since the right claimed was given by a law of the United States, the Court considered it to be a case of federal judicial power within the categories of cases enumerated in section 2 (that is, a case ‘arising under ... the Laws of the United States’).<sup>9</sup> However, whether the Court had jurisdiction to issue the claimed relief depended on two things: first, whether this claim was instituted in the Court’s original or appellate jurisdiction; and second, whether the type of case in question (that is, a case ‘arising under the laws of the United States’) was to be heard in the Court’s original or appellate jurisdiction.

As for the first issue, the Court considered that *Marbury*’s claim was one that fell within original jurisdiction.<sup>10</sup> For the Court, it was ‘the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause’. To order mandamus against a federal government officer for the delivery of a commission was ‘in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction’.<sup>11</sup> Thus, *Marbury* was seeking relief in the Court’s original jurisdiction.

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8 This article has benefited considerably from the publication of the successive drafts of the Constitution by John Williams, above n 2.

9 *Marbury v Madison*, 5 US 137, 173 (1803).

10 *Ibid* 175–6.

11 *Ibid*.

However, had the Court been given original jurisdiction to hear such a claim for relief? In this regard the Court considered that the relevant provisions of Article III are structured in a way that sets out a list of cases of federal judicial power, and then goes on to distribute them between *original* and *appellate* jurisdiction. Cases ‘arising under ... the Laws of the United States’ had not been allocated to the original jurisdiction of the Court; only the two matters mentioned in paragraph 2 were allocated to original jurisdiction. In response to the suggestion that Congress could assign original jurisdiction to the Supreme Court in cases other than the two mentioned in paragraph 2, the Court replied:

If it had been intended to leave it to the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial powers, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction made in the constitution, is form without substance. ...

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.<sup>12</sup>

Thus, the Court could not issue the relief because it did not have *original* jurisdiction in relation to the case.

When Inglis Clark sat down to draft the judicial provisions of his constitution, he adopted the structure and much of the content of Article III. In his clause 62, the judicial power of the Federal Dominion of Australasia was to extend to a list of cases or controversies, including: ‘cases arising under any Laws made by the Federal Parliament’; ‘all cases affecting the Public Ministers, or other accredited representatives of other Countries, and Consuls’; ‘all cases in which the Federal Dominion of Australasia shall be a party’; and ‘disputes or controversies between two or more Provinces’.<sup>13</sup> The cases and controversies set out in clause 62 closely reflected those included in Article III, section 2, paragraph 1 of the United States Constitution.

In clauses 63 and 64, Inglis Clark proceeded to divide the cases and controversies between *original* and *appellate* jurisdiction, in the same terms as Article III, section 2, paragraph 2 of the United States Constitution. Those clauses read:

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<sup>12</sup> Ibid 174–5.

<sup>13</sup> See Williams, above n 2, 88.

Clause 63: In all cases affecting Public Ministers, or other accredited Representatives of other Countries, and Consuls, and in all cases in which a Province shall be a party, or in which a Writ of Mandamus or Prohibition shall be sought against a Minister of the Crown for the Federal Dominion of Australasia, the Supreme Court shall have original jurisdiction.

Clause 64: In all cases other than those mentioned in the immediately preceding section the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Federal Parliament shall authorise.<sup>14</sup>

The resemblance to the United States Constitution in both structure and content is clear.<sup>15</sup> The only relevant difference is the inclusion in clause 63, within original jurisdiction, of cases ‘in which a writ of mandamus or prohibition shall be sought against a Minister of the Crown for the Federal Dominion of Australasia’.

Given his understanding of the constitutional law of the United States, including the decision in *Marbury v Madison*, it is reasonable to infer that Inglis Clark intended that his clauses 62–4 would operate in the same way as Article III, Section 2, paragraphs 1 and 2 were said to operate by the Supreme Court in *Marbury v Madison*. That is, clause 62 operated to identify categories of cases and controversies to which federal judicial power would extend, and clauses 63 and 64 operated to allocate those cases or controversies either to original or appellate jurisdiction.

Because the reference to writs of mandamus and prohibition was only included in clause 63 and not clause 62 of Inglis Clark’s draft, his assumption must have been that claims for such writs against Commonwealth officers would otherwise fall within one of the categories of cases or controversies in his clause 62. Such categories of cases may have included ‘cases arising under any law made by the Federal Parliament’;<sup>16</sup> ‘cases in which the Federal Dominion of Australasia shall be a party’;<sup>17</sup> or ‘cases in Law and Equity arising under this Act [the Constitution]’.<sup>18</sup> Under Inglis Clark’s design, those cases would fall within the appellate jurisdiction of the High Court, except to the extent that there was a claim for mandamus or prohibition against an officer of the Commonwealth. This was a direct and narrowly targeted response to *Marbury v Madison*.

The first official draft of the Constitution contained this basic structure and breakdown of content, as did the draft provisions prepared by the Judiciary Committee chaired by Inglis Clark.<sup>19</sup> However, there must have been early

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14 Clause 64 went on to give the Supreme Court appellate jurisdiction from the courts of the Colonies. The draft prepared by Charles Kingston had similar content and structure, but no reference to writs of mandamus and prohibition: *Ibid*, 89, 127–8.

15 In a memorandum to the delegates before the 1891 Convention started, Inglis Clark explained that he had largely ‘followed the American model’: see Williams, above n 2, 69.

16 The forerunner of s 76(ii) of the Constitution. This was the case in *Marbury v Madison* where a statute had created the right claimed: 5 US 137, 174–5 (1803)). Equally it would be available where the statute imposed a duty on an executive officer that is sought to be enforced.

17 The forerunner of s 75(iii) of the Constitution.

18 The forerunner of s 76(i) of the Constitution.

19 Both of which were dated 24 March 1891: see Williams, above n 2, 151, 359–61.

doubts (at least from Sir Samuel Griffith, the chair of the 1891 Constitutional Committee and member of its Drafting Committee) as to whether writs of mandamus and prohibition would otherwise fall into the list of categories of cases and controversies (or perhaps some confusion as to what Inglis Clark was trying to do), because the list of cases defining the extent of federal judicial power was then changed to include an express reference to mandamus and prohibition.<sup>20</sup> Except for one period of time, from that point on until the draft constitution went to the Drafting Committee in Melbourne in 1898 for its final drafting changes, the same basic structure was adopted. The list of categories of cases that triggered federal judicial power included a reference to mandamus and prohibition, and then a subsequent clause allocated the jurisdiction in such a way that the High Court would have original jurisdiction (and later both original and appellate jurisdiction)<sup>21</sup> to hear such claims. The exception was the brief period when the reference to writs of mandamus and prohibition was, during the Melbourne session of the Convention, struck out of both the list of heads of matters defining the extent of federal judicial power and the subsequent clause allocating jurisdiction between original and appellate jurisdiction.<sup>22</sup> The clauses were struck out on the 31 January 1898,<sup>23</sup> and reinserted on 4 March 1898 upon further consideration.<sup>24</sup>

The striking out was largely driven by Isaac Isaacs, who considered that the express mention of mandamus and prohibition achieved nothing, introduced a conflation of power and remedy and might cause interpretive difficulties.<sup>25</sup> Barton had proposed the striking out, but on the basis of what Isaacs had said to him.<sup>26</sup>

It is important to explore Isaacs' position further. From his contributions to the striking out debate and then in opposition to the reinsertion of the clauses, it

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20 A handwritten notation by Griffith inserting writs of mandamus and prohibition against officers of the Commonwealth into the list of cases and controversies appears on a First Proof Submitted to the Constitutional Committee, dated 26 March 1891: Williams, above n 2, 178. John Williams has observed that 'It cannot be determined whether Griffith's annotations ... were made during or after the discussions of the Constitutional Committee on 26 March': at 162. The handwritten notation was again made on the draft dated 28 March 1891 containing the changes agreed to by the Drafting Committee (comprising Griffith, Kingston and Barton – in Inglis Clark's absence) during the *Lucinda* voyage: at 199. The revised drafts following the *Lucinda* draft, and the successive drafts thereafter, included writs of mandamus and prohibition amongst the list of categories of cases defining the extent of federal judicial power as well as in the subsequent clause allocating jurisdiction between original and appellate jurisdiction: at 212, 228.

21 In an early draft dated 28 March 1891, there was a handwritten notation by Griffith changing the allocation of these items from *original* jurisdiction (as envisaged by Inglis Clark) to *original* and *appellate* jurisdiction: Williams, above n 2, 179. The changes were then made to the typed text in the revised draft dated 28 March 1891: at 228.

22 By then the American words 'cases' and 'controversies' had been replaced by the word 'matters'.

23 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 321 (the list of matters of judicial power), 349 (the allocating provision).

24 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1885 (the list of matters of judicial power), 1894 (the allocating provision).

25 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 321.

26 *Ibid* 320.

is clear that Isaacs was of the view that claims for mandamus and prohibition would otherwise be made in matters falling within the category later described as ‘matters ... [i]n which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party’ – the section 75(iii) forerunner.<sup>27</sup> And, from the first official draft of the Constitution, that category of matters had been included in both the list of matters to which Commonwealth judicial power extended and the subsequent clause allocating original jurisdiction to the Court.<sup>28</sup> Thus, the inclusion of references to mandamus and prohibition was unnecessary as the Court would have the power to enforce its decrees when exercising its jurisdiction by whatever remedy was appropriate.<sup>29</sup>

Furthermore, Isaacs was concerned that judicial power was being defined by reference to a set of remedies. In an exchange with Barton about the need for the provision’s reinsertion, Isaacs said:

This [mandamus] is, only a remedy for carrying out powers of the court, and you cannot put within the judicial power a mere remedy where there is no right. The great distinction between the Constitution as we frame it and the Constitution of the United States is that in the United States there is no original jurisdiction at all, in a case where the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party, and therefore you can understand how a mandamus being a remedy in such a case is not within its original jurisdiction. But we put it within the original jurisdiction here, and it seems to me that a mandamus follows with it.<sup>30</sup>

Thus, Isaacs understood Inglis Clark’s structural plan,<sup>31</sup> but recognised the conceptual difficulties of mixing remedies with power.<sup>32</sup>

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27 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1882–3.

28 Williams, above n 2, 151. Closely following the US model in this respect, Inglis Clark had not allocated this category of case to original jurisdiction: Williams, above n 2, 89. It is possible that Griffith’s first official draft was influenced by Kingston’s draft which did allocate to original jurisdiction ‘all controversies to which the Union shall be a party’: at 127.

29 In response to a question by Bernhard Wise, Isaacs said that mandamus would be ‘ancillary to every case where the Court has jurisdiction’: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1883. He also made the point that if the Court was considering a case arising under the Constitution, it would have the power ‘to exercise its jurisdiction by way of mandamus, or injunction, or prohibition’: at 1881. Indeed, it would appear that Isaacs’ position on the provision was initially accepted by the delegates. By deleting the reference to mandamus and prohibition in both the list of cases of judicial power and the subsequent allocating provision, the drafters must have assumed that claims for mandamus and prohibition against Commonwealth officers would otherwise fall within a category of judicial power. See, eg, Barton’s statement on the reintroduction of the provisions: ‘but ultimately the sub-section was left out, on the ground that the proceeding could probably be taken without any express power being given for them’: at 1875.

30 *Ibid* 1882–3.

31 The only relevant difference between Inglis Clark’s intended design and that of Isaacs was that the forerunner to s 75(iii) had not been allocated to the High Court’s original jurisdiction in Inglis Clark’s draft. Whereas, it had by the time Isaacs put forward his views.

32 At this point the heads of federal jurisdiction were still described as matters to which the federal *judicial power* extended. It was not until the Drafting Committee redrafted the provisions at the end of the Melbourne session of the 1897–8 Constitutional Convention that the language of *jurisdiction* was used. This initial use of the expression of *judicial power* may have accounted for Isaacs’ concerns in this regard.



Finally, for Isaacs the insertion of mandamus and prohibition might in fact operate as words of limitation. In supporting the striking out of the clauses, he said: ‘if we put in these words the inference will be irresistible that if they had not been put in the court would not have had this power’.<sup>33</sup> In opposition to their reinsertion, he continued: ‘My great objection to the proposal is that it will operate as a limitation upon other provisions for judicial power. It assumes there is no power to grant a mandamus.’<sup>34</sup>

Thus, given that actions against officers of the Commonwealth would otherwise come within the Court’s original jurisdiction, Isaacs considered that the exclusion of the clauses on mandamus and prohibition would still achieve Inglis Clark’s intention, but without the complications and possible dangers of their express inclusion.

To summarise so far, it would appear that Inglis Clark’s original intention was to ensure that the High Court had *original* – as opposed to *appellate* – jurisdiction to hear claims for mandamus and prohibition. This purpose related to the *allocation* or *distribution* of federal jurisdiction between original and appellate jurisdiction, and was a direct response to the actual problem in *Marbury v Madison*. Isaacs understood that intended design, but thought it was achieved by the forerunner to section 75(iii) having been allocated to the Court’s original jurisdiction.

Unfortunately, it is unclear what Inglis Clark said to Barton in his telegram urging the reinsertion of the clauses. However, it must have been, at least in part, to emphasise this intention for the provision,<sup>35</sup> as Barton seemed to make the same point when he sought to reintroduce the clause at the end of the Melbourne session. He said:<sup>36</sup>

The object of this clause is a very clear one ... In certain cases the Supreme Court would have original jurisdiction, in others appellate. If you do not specially mention this, then in cases of mandamus, prohibition and injunction, it can only have the ordinary appellate jurisdiction, but if you mention it specially as within the judicial power, and provide for it as an original jurisdiction, then a case may be taken straight to the court instead of having to filter through another court.<sup>37</sup>

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33 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 321.

34 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1879.

35 This conclusion is also supported by a letter sent by Inglis Clark to one of the delegates to the Melbourne session of the 1897–8 Convention, Bernhard Wise, in which Inglis Clark urged ‘the restoration of the clause giving the Supreme Court *original* jurisdiction in cases of Mandamus and Prohibition against officers of the Commonwealth’: Williams, above n 2, 848 (emphasis added). The emphasised words appear to have been deliberately chosen in contrast to the tail end of the same sentence where Inglis Clark urged Wise to support ‘the insertion of a clause *extending the judicial power of the Commonwealth* to suits between citizens of different States’: at 848 (emphasis added). Thus, it was not just a matter of extending judicial power to writs of mandamus or prohibition; it was a question of giving the Supreme Court original jurisdiction to hear them. Consistently with the view that he must have held when drafting his original clauses, Inglis Clark seems to have assumed that writs of mandamus and prohibition would have otherwise fallen into the list of categories of cases triggering federal jurisdiction.

36 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1881.

37 As explained below, Barton had doubts as to whether writs of mandamus and prohibition would otherwise fall within the categories of cases of federal jurisdiction. That explains his emphasis on the need to ‘mention it specially *as within the judicial power*, and provide for it *as an original jurisdiction*’.

The same point was emphasised again by Barton in other contributions.<sup>38</sup>

Inglis Clark's design was, however, by the end entirely lost from view. Unlike Isaacs (and perhaps Josiah Symon),<sup>39</sup> Barton considered that the claims for mandamus and prohibition against Commonwealth officers would not come within what is now section 75(iii) or any other federal matter either because 'a proceeding against the Crown cannot be taken without an express Act to authorize it'<sup>40</sup> or because the words did not cover 'a person who is being simply impleaded in an action of law'.<sup>41</sup> Consequently, for Barton, the inclusion of writs in the list of cases of judicial power operated to create federal jurisdiction. Thus, by the end of the delegates' contributions, Inglis Clark's original design had been fundamentally altered. Mandamus and prohibition were included in the clause defining the extent of federal judicial power and in the subsequent provision allocating original jurisdiction to the High Court. The former clause operated to create jurisdiction, the latter to identify it as original jurisdiction (as well as appellate jurisdiction).

Furthermore, the final stages of the drafting process were to substantially alter the structure of these judicial provisions. Whereas the model in the United States, as adopted by Inglis Clark and the Convention until that time, was to set out a list of cases of federal jurisdiction and then, subsequently, to allocate them between the High Court's original and appellate jurisdiction, that structure resulted in some inelegant drafting in light of the fact that the High Court was also to be given appellate jurisdiction in a separate clause.<sup>42</sup>

There was no equivalent appellate jurisdiction clause in Article III of the United States Constitution, as the Supreme Court was not to be a court of general appeal from state courts. But, in Australia, it was always intended that the High Court would perform that general appellate function.<sup>43</sup> On that basis, it was no doubt easier to deal with the High Court's original jurisdiction in one set of clauses and its appellate jurisdiction from all courts – federal and state – in

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38 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1883–4, 1885.

39 Symon agreed with Isaacs that the Court 'would have the jurisdiction': *ibid* 1882. However, as will be explored further below, he had a very different reason for making claims for mandamus and prohibition a matter of original federal jurisdiction – a federalist reason that protected Commonwealth officers from State judicial power.

40 *Ibid* 1875.

41 *Ibid* 1884. It is possible that Barton recalled an explanation given to him by Griffith on the *Lucinda* as to why it was necessary to include mandamus and prohibition in both the list of matters to which federal judicial power extended and the subsequent clause allocating it as original jurisdiction: see above n 21.

42 This separate clause as proposed by Inglis Clark, and as initially adopted in early drafts of the Constitution, dealt only with appeals from State courts. By the time the clause went to the Drafting Committee for its final drafting changes at the end of the Melbourne session of the 1897–8 Convention the separate appeal clause provided for appeals from both State and federal courts.

43 For discussion of earlier attempts to create an Australasian Court of Appeal, see J M Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (Australian Government Publishing Service, 1980) 3–5. The establishment of a general court of appeal was contemplated in the resolutions for the Sydney Convention in 1891 (see Williams, above n 2, 47), and was a central pillar of the judiciary provisions throughout the debates.

another clause. Thus, we see the Drafting Committee<sup>44</sup> moving away from the structure in the United States to a different one that we now have: sections 75 and 76 deal with original jurisdiction and section 73 deals with appellate jurisdiction.<sup>45</sup>

The end result is that we have one reference in section 75(v) to writs of mandamus and prohibition (with the addition of injunctions<sup>46</sup>). While this achieved Inglis Clark's intention of ensuring that the Court was to have original jurisdiction, the final structure adopted disguises the fact that Inglis Clark's intention (along with one of Barton's expressed intentions during the debates) was to respond to *Marbury v Madison*, a problem about *allocating* or *dividing* federal jurisdiction. For Inglis Clark, his clause 63 *allocated* writs of mandamus and prohibition to the Court's original jurisdiction: it did not operate to *create* jurisdiction.

## B Barton's Accountability Purpose

Although Barton was initially persuaded by Isaacs to urge the Convention to strike out the mandamus and prohibition clauses, he changed his mind following the telegram from Inglis Clark. *Marbury v Madison* seemed 'to be a leading case' and so he gave notice 'to restore the words on the reconsideration of the clause'.<sup>47</sup>

When initially explaining why the category of mandamus, prohibition and injunctions should be reintroduced into the list of cases of judicial power, Barton did not accurately capture the *Marbury v Madison* problem. He presented the argument on the basis that the Supreme Court did not have the 'right of entertaining cases of mandamus or prohibition against an officer of the United States ... the Constitution did not place in the hands of the High Court the power to entertain these questions'.<sup>48</sup> He explained his concern that it might be held by the High Court that it did not have the power, and that a statute conferring such a power would be invalid.<sup>49</sup> This was a misunderstanding of the case. The Court had no original jurisdiction, but it had appellate jurisdiction.<sup>50</sup>

This imprecision, however, seemed to be rectified by Barton later in the debates when he returned to explain the finding in *Marbury v Madison* and the problem that was sought to be overcome.<sup>51</sup> As mentioned earlier, it was to

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44 Consisting of Barton, Richard O'Connor and Sir John Downer, with the assistance of Robert Garran.

45 These changes were adopted without further debate: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 16 March 1898, 2453, 2456.

46 A reference to injunction was included in the clauses as reintroduced by Barton. Until that time, the relevant clauses only referred to mandamus and prohibition.

47 Williams, above n 2, 846.

48 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1875.

49 *Ibid* 1876.

50 That misunderstanding may partly explain why Barton formed the view that claims for mandamus and prohibition needed to be included in the list of cases of judicial power as well as in the provision dividing jurisdiction between original and appellate jurisdiction.

51 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1881, 1883, 1884.

give the High Court original jurisdiction, as well as appellate jurisdiction, in these cases, so that when a person wishes to obtain the performance of a clear statutory duty, or to restrain an officer of the Commonwealth from going beyond his duty, or to restrain him in the performance of some statutory duty from doing some wrong, he can obtain a writ of mandamus, a writ of prohibition, or a writ of injunction.<sup>52</sup>

For Barton, this would be achieved by the inclusion of mandamus, prohibition and injunction in the clause defining the extent to which the judicial power extended (as he did not consider those matters to otherwise fall within the various enumerated matters), and to the subsequent clause allocating the High Court original and appellate jurisdiction in that matter.

Ostensibly, Barton was supporting the reintroduction of the clauses for Inglis Clark's jurisdiction allocation purpose. However, he also considered that jurisdiction had to be created, and, importantly, his inclusion of mandamus, prohibition and injunction in the clause defining the extent of federal judicial power was for the purposes of *creating* an accountability mechanism. Thus, without further contribution by the delegates, Barton ended the debates by saying that the clause was designed to allow the High Court to 'exercise its function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution'.<sup>53</sup>

### C Alternate Federalist Vision of Section 75(v)

The fourth main contributor to the debate, Symon, painted a very different picture of the section 75(v) forerunners. In support of reinserting the clause that would define judicial power to extend to mandamus, prohibition and injunction against an officer of the Commonwealth, and in the course of dismissing concerns that section 75(v) would unsettle the relationship between the executive and the judiciary, Symon – who had been chairman of the Judiciary Committee – insisted that 'the sole object that the Judiciary Committee had in view in inserting it in the first instance'<sup>54</sup> was to protect federal officers from state jurisdiction.<sup>55</sup>

All it says is that an application for mandamus or prohibition against an officer of the Commonwealth must be taken to the High Court or other of the Federal Courts. An application cannot be made to a state court, although the incident which brings the application about may happen in a particular state. ... It is a safeguard and a limitation. It prevents an officer of the Commonwealth, whether Minister or anybody else, from being proceeded against in any state, in regard to the Commonwealth.<sup>56</sup>

The necessity [of its reinsertion] is to bring all those applications for writs of mandamus, prohibition, and injunctions as against officers of the Commonwealth in the Commonwealth courts, and not to have them brought in the state courts, in which they undoubtedly ought not to be brought.<sup>57</sup>

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52 Ibid 1884.

53 Ibid 1885.

54 Ibid 1879.

55 Ibid 1882.

56 Ibid 1878.

57 Ibid 1879.

What we want to prevent is that state courts shall have the jurisdiction over Commonwealth officers.<sup>58</sup>

Although Symon spoke in terms of protecting federal officers from *state courts*, it is clear that he appreciated the Chapter III scheme that state courts would exercise federal jurisdiction, and that such applications might proceed in state courts if invested with federal jurisdiction.<sup>59</sup> Thus, it was an exercise of state judicial power that Symon sought to protect federal officers from.

For Symon, then, the inclusion of mandamus, prohibition and injunction in the clause defining the extent of judicial power was designed to create federal jurisdiction. And, importantly, Symon was of the view that it would create *exclusive* federal jurisdiction displacing the possibility of state jurisdiction over federal officers.<sup>60</sup> In this respect, Isaacs took issue. Isaacs responded to Symon that the clause did not make the jurisdiction exclusive, and ‘if the power to make such an application in the state court exists the insertion of these words cannot take that power away.’<sup>61</sup> It is not clear what impact this exchange had on the other delegates, although at least Sir Edward Braddon was left with the impression that the jurisdiction would be exclusive.<sup>62</sup>

Regardless, it would appear that Isaacs had a point. At that stage of the debates, the draft constitution contained the forerunner of the current sections 77(ii) and 77(iii) which allow Parliament to invest federal jurisdiction in state courts, but to make certain matters of federal jurisdiction exclusive to federal courts. For Isaacs, the inclusion of mandamus, prohibition and injunction in the clause defining the scope of judicial power would not, itself, serve to make that jurisdiction exclusive. The mechanism for making the jurisdiction exclusive was specifically set out. Consequently, as Isaacs said, if state judicial power existed over federal officers, the inclusion of a clause defining the judicial power of the Commonwealth to extend to mandamus, prohibition and injunction against officers of the Commonwealth would not displace that jurisdiction.

In summary, apart from Inglis Clark’s jurisdiction *allocating* purpose for section 75(v), we see two distinct visions of section 75(v): Barton’s *accountability* vision of protecting the individual against the Commonwealth; and Symon’s *federalist* vision of protecting Commonwealth officers from state jurisdiction. Because the contributions from other delegates were limited, it is difficult to assess how the Convention as a whole was affected by the discussions, and on which basis the Convention agreed to reinsert the clauses. Furthermore, some of that discussion – including as to Inglis Clark’s design – was overtaken by the streamlining of the provisions by the Drafting Committee after the debates on the clauses had concluded. What implications then might we draw from the debates for our current understanding of section 75(v)?

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58 Ibid 1882.

59 Ibid 1877, 1881–2.

60 Ibid 1878.

61 Ibid 1879.

62 Ibid 1881.

### III IMPLICATIONS

The last part of this article will consider four implications of this drafting history.

#### A Relationship Between Sections 75(iii) and 75(v)

The drafting history tells us quite a bit about the relationship between sections 75(iii) and 75(v). Observations in High Court cases indicate that section 75(v) was included in the Constitution out of a concern that claims for mandamus, prohibition and injunction against an officer of the Commonwealth would not otherwise fall within section 75(iii) of the Constitution. As Gaudron and Gummow JJ said in *Re Refugee Tribunal; Ex parte Aala*:

It appears that s 75(v) was included as a safeguard against the possibility that the provision in s 75(iii) respecting matters in which a person being sued on behalf of the Commonwealth is a party would be read down by reference to decisions construing Art III of the United States Constitution.<sup>63</sup>

Of the four main contributors to the debates on the section 75(v) forerunners, only Barton expressed that concern. This concern led him to include a reference to the remedies in both the clause defining the extent of Commonwealth judicial power and the subsequent clause allocating jurisdiction as original or appellate.

As explained, however, Inglis Clark's draft was put forward on the assumption that claims for such remedies would fall within a case or controversy otherwise set out, and one of the main candidates was the section 75(iii) equivalent. Isaacs clearly was of the view that such claims would fall within the equivalent of section 75(iii) and, thus, there was no need for its reinsertion. Symon seemed to agree with Isaacs' assessment,<sup>64</sup> but supported its reinsertion on the basis that it was needed to displace state jurisdiction. However, in this respect, if the view were taken that such remedies would otherwise have fallen within section 75(iii), then an express reference to the remedies was hardly needed.

Consequently, the reinsertion of the clause can probably only be explained either (as the High Court has surmised) by reference to Barton's concerns that the section 75(iii) was inadequate, or according to Symon's (perhaps misguided) concern for abundant caution to protect against state jurisdiction over federal officers. The more significant point, however, is that, on all accounts, the purposes of sections 75(iii) and 75(v) are symbiotically linked.

#### B The Meaning of 'Officer of the Commonwealth'

A key manifestation of that symbiotic relationship should be seen in the meaning of the words 'officer of the Commonwealth' in section 75(v). Very little

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63 (2000) 204 CLR 82, 92 ('*Aala*'); citing *Ah Yick v Lehmert* (1905) 2 CLR 593, 608–9; *Bank Nationalisation case* (1948) 76 CLR 1, 363–8; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 178–9, 204, 221, 231–2. See also *Aala* (2000) 204 CLR 82, 138–9 (Hayne J).

64 See above n 41.

has been said by the High Court about what that expression means.<sup>65</sup> In the recent case of *Plaintiff M61*,<sup>66</sup> one of the questions that arose for the Court was whether a private contractor could be considered to be an officer of the Commonwealth when undertaking an inquiry and making recommendations for the purposes of informing a decision by the Minister for Immigration to allow an application for a protection visa under the *Migration Act 1958* (Cth). Because the Commonwealth and Minister were also named as parties, the Court otherwise had jurisdiction under both sections 75(iii) and 75(v). Consequently, it was not required to explore the reach of the expression ‘officer of the Commonwealth’.

By contrast, the meanings of ‘the Commonwealth’ and ‘a person suing or being sued on behalf of the Commonwealth’ have been given closer consideration by some High Court judges, as has the purpose of section 75(iii). The High Court has generally taken a broad view of those expressions, and has done so with certain objectives in mind. In the *Bank Nationalisation Case*,<sup>67</sup> when explaining why the expression ‘the Commonwealth’ in section 75(iii) should be given a broad interpretation to cover the Commonwealth Bank in the form it then took, Dixon J said:

The purpose of s. 75(iii.) obviously was to ensure that the political organization called into existence under the name of the Commonwealth and armed with enumerated powers and authorities, limited by definition, fell in every way within a jurisdiction *in which it could be impleaded and which it could invoke*.<sup>68</sup>

If we focus on the final italicised words in this quotation, there is some correspondence with the language used in the drafting history of section 75(v). The first part of the section matches Barton’s *accountability* justification for section 75(v) and the second is suggestive of Symon’s justification of *protecting* the Commonwealth from state jurisdiction.

His Honour then proceeded to link section 75(iii) to section 75(v):

Section 75(iii.) cannot be read without s. 75(v.) which, it is apparent, was written into the instrument to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power.<sup>69</sup>

This second statement by Dixon J only picks up the accountability purpose identified by Barton, and fails to translate Symon’s protective federalist purpose into section 75(v).

65 It has been recognised as having a broad meaning: see *Aala* (2000) 204 CLR 82, 140 (Hayne J). Although it covers both judicial and non-judicial officers (see *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow* (1910) 11 CLR 1; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Company Ltd* (1914) 18 CLR 54), it was held not to cover state judges exercising federal jurisdiction in *R v Murray; Ex parte Commonwealth* (1916) 22 CLR 437 (*‘Murray’*). In the course of reaching that conclusion in *Murray*, Isaacs J said at 452 that ‘[a]n “officer” connotes an “office” of some conceivable tenure, and connotes an appointment, and usually a salary.’ His Honour’s decision, however, need not be seen as turning on those propositions.

66 (2010) 272 ALR 14.

67 (1948) 76 CLR 1.

68 *Bank Nationalisation Case* (1948) 76 CLR 1, 363 (emphasis added).

69 *Ibid* 363.

The two sides of section 75(iii) were again emphasised by Barwick CJ in *Inglis v Commonwealth Trading Bank of Australia*.<sup>70</sup> In supporting his view that the expression ‘the Commonwealth’ should be read broadly, his Honour said:

The fundamental purpose, as it seems to me, of including par. (iii.) in this section of the Constitution thus giving original jurisdiction to this Court in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party was to ensure that the Commonwealth either in its form as established under the Constitution, or in any form with which it may lawfully clothe itself *should not be compelled to pursue its rights in the courts of the States*. ... Consequently, in the construction and application of s. 75(iii.) largeness rather than narrowness of approach is appropriate. If in reality the Commonwealth is before the Court in the litigation, no matter of form or of nomenclature can be allowed to deny the Court jurisdiction to hear and determine the *rights asserted by or against it*.<sup>71</sup>

Thus, in relation to the provision that Isaacs (and perhaps Inglis Clark) thought would create federal jurisdiction in relation to claims for mandamus and prohibition against Commonwealth officers – that is, section 75(iii) – the High Court has recognised the purpose of *accountability* and the *federalist* purpose to protect the Commonwealth from state jurisdiction. However, that understanding has not been carried through to section 75(v).

If both understandings of the purpose of section 75(v) are carried through into that provision, then the expression ‘officers of the Commonwealth’ may similarly be given a broad meaning when applying that expression to grey areas like corporate entities or private actors exercising government functions. Commentators have suggested that a broad view of ‘officer of the Commonwealth’ might be required to give effect to the purpose of accountability.<sup>72</sup> Symon’s protective purpose adds strength to that argument.

Additionally, it might be the case that the protective federalist purpose may even allow the expression ‘officer of the Commonwealth’ to be applied in circumstances not warranted by an accountability explanation. *Plaintiff M61* might provide a useful example of this point. As a reminder, in that case a private contractor undertook an inquiry and made recommendations that informed the Minister’s exercise of power under the *Migration Act* to allow an application for a protection visa. On one view, an accountability understanding of section 75(v) might result in the private contractor being considered to be a Commonwealth officer. On that view, the Commonwealth should not be permitted to contract out highly sensitive decision-making to avoid the supervisory jurisdiction of the courts. However, on another view, because the ultimate decision rests with the Minister, the line of accountability remains intact. Thus, on that view, the accountability purpose of section 75(v) may not compellingly lead to an application of section 75(v).

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70 (1960) 119 CLR 334.

71 Ibid 335–6 (emphasis added).

72 See, eg, Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 71–2; Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4<sup>th</sup> ed, 2009) 40.



The protective federalist view of section 75(v) might, however, call for the application of section 75(v) in those circumstances. On this view, the Commonwealth should be able to design its legislative decision-making schemes – to ‘clothe’ its decision-makers in whichever way it lawfully can – without the Commonwealth losing its protection from state jurisdiction.<sup>73</sup> This also raises broader questions about whether private actors exercising public functions can be subjected to prerogative relief.<sup>74</sup> The protective federalist understanding of section 75(v) might suggest that the private actors may be subject to those writs as ‘officers of the Commonwealth’.

### C The Existence of State Jurisdiction to Order Writs Against Federal Officers

The question of whether state courts have jurisdiction over federal officers has rarely arisen as the Commonwealth very early exercised its power in section 77(ii) (along with section 77(iii)) to strip states of any jurisdiction that may have belonged to them in relation to matters within the jurisdiction of the High Court, including section 75(v).<sup>75</sup> However, before the High Court was established in 1903, proceedings were instituted in the NSW Supreme Court for mandamus to compel the Commonwealth Collector of Customs to deliver up certain books and documents.<sup>76</sup> The Commonwealth Parliament had not given state courts federal jurisdiction under section 75(v), so if they were to have jurisdiction in this case it was to be state jurisdiction.

In *Ex parte Goldring*, the Supreme Court held that it had no jurisdiction. In rejecting the application, Stephen ACJ considered that neither the state legislature nor the state government had ‘anything to do with the matter’: it was ‘entirely a matter for the Federal Government’.<sup>77</sup> The duty owed by the federal officer was seen by Stephen ACJ as a duty owed to the federal government not the state government, and the failure to perform it was ‘a matter entirely between him and the Government that appointed him’.<sup>78</sup> It was for the Commonwealth Parliament to confer such jurisdiction, but it had not done so. The conceptual basis for this position appears more clearly in the decision of Owen J. Finding no

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73 As one of the referees has suggested, it is possible that Symon’s view would not *necessarily* have led to this conclusion. It is possible that Symon was simply concerned about protecting federal officers from state jurisdiction without having any particular view about how wide that jurisdiction should be. However, I think the better view is that the force with which Symon sought to protect federal officers from state jurisdiction would translate into a generous view being taken of Parliament’s power to design decision-making schemes without losing the benefit of that protection. That appears to have been Chief Justice Barwick’s view in relation to s 75(iii) in *Inglis*: see above n 71.

74 This was a question left open by the Court in *Plaintiff M61* (2010) 272 ALR 14.

75 See *Judiciary Act 1903* (Cth) ss 38, 39(1) (*‘Judiciary Act’*). This was done to exclude appeals as of right to the Privy Council from state courts: see James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010) [2.80]–[2.81]. See also *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 9, which expressly prevents a state court from exercising review jurisdiction under that Act.

76 *Ex parte Goldring* (1903) 3 SR (NSW) 260, 262.

77 *Ibid.*

78 *Ibid.*

analogy in any of the English cases, his Honour looked to American authorities for assistance and said:

In America it had been decided over and over again that a mandamus will not lie in a State to compel the performance of a duty by a Federal officer. ... The American decisions appeared to be based upon the principle of separate sovereignties, the Federal and the State Government are two distinct entities, as distinct to my mind as if they were separated by territorial boundaries.<sup>79</sup>

For that reason, Owen J held that the Court had no power to compel the performance of duty. His Honour did not cite any American cases, however, he was presumably referring at least to the decision of the United States Supreme Court in *McClung v Silliman*,<sup>80</sup> relied upon by counsel for the Commonwealth Collector of Customs. In that case, the Court considered that a state court had no jurisdiction to order mandamus against an officer of the United States government. Delivering the Opinion of the Court, Johnson J said that ‘his conduct can only be controlled by the power that created him’.<sup>81</sup>

It was not until 2008 that three members of the High Court addressed this question. In *MZXOT*,<sup>82</sup> the plaintiff instituted proceedings in the High Court seeking relief against an officer of the Commonwealth, thereby triggering the jurisdiction under section 75(v). The plaintiff then sought an order for the Court to remit his application to the Federal Magistrates Court. There was no statutory authority for the Court to remit the matter, nor jurisdiction vested in the Federal Magistrates Court to hear it. The plaintiff instead argued that the Court had an ‘implied power’ to do so. In the course of determining this question, Gleeson CJ, Gummow and Hayne JJ considered whether, in the absence of sections 38 and 39(1) of the *Judiciary Act*, a state court would have jurisdiction to hear a claim that otherwise triggered federal jurisdiction under section 75(v).

In responding to this issue, their Honours observed that some heads of federal jurisdiction in sections 75 and 76 ‘identify controversies well known in the anterior body of general jurisprudence in the colonies (for example, actions in tort or contract between residents of the former colonies)’.<sup>83</sup> However, other heads, including section 75(v), identify controversies which were not.<sup>84</sup> This distinction, their Honours said, ‘was apparent to Inglis Clark’ in 1901, when he wrote that there are certain matters in which the judicial power of the Commonwealth is ‘*necessarily exclusive* of the judicial power of the States’,<sup>85</sup> and in relation to which state courts would need federal jurisdiction. One of those matters was where a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.<sup>86</sup> In support of that proposition, Inglis

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79 Ibid 264.

80 19 US 598 (1821).

81 Ibid 605.

82 (2008) 233 CLR 601.

83 Ibid, 619; citing *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 33–4, 36–7.

84 Ibid; citing *Kruger v Commonwealth* (1997) 190 CLR 1, 171.

85 A Inglis Clark, *Studies in Australian Constitutional Law* (G Partridge & Co, 1901) 177–8; quoted in *MZXOT* (2008) 233 CLR 601, 620 (emphasis added).

86 Ibid.

Clark referred to the United States case of *McClung v Silliman*, the same decision later relied upon by counsel for the Collector in *Goldring*. In accepting the position of Inglis Clark, Gleeson CJ, Gummow and Hayne JJ also relied upon the authority of *Goldring* and the subsequent supporting observations of Harrison Moore.<sup>87</sup>

The difficulty with this explanation, as Professor Leslie Zines has pointed out, is that covering clause 5 of the Constitution makes the Constitution and Commonwealth legislation binding on state courts.<sup>88</sup> Thus, irrespective of whether the controversies were familiar to state courts prior to federation, the Constitution appears to mandate the application (and presumably the enforcement) of constitutional and federal statutory provisions authorising federal officers to act. In *MZXOT*, Gleeson CJ, Gummow and Hayne JJ appeared to be alert to this issue, but discounted it as a problem:

In the United States, the circumstance that a State court had inherited the jurisdiction of the Court of King's Bench with respect to mandamus, and *the operation of the Supremacy Clause in Art VI* and the reservation of powers to the States by the 10th Amendment, did not have the consequence that mandamus might issue from that State court to a federal officer. In Australia *the same may be said of covering cl 5 of the Constitution*.<sup>89</sup>

But, upon what basis can it be said that covering clause 5 can be put to one side? Do the contributions of our key delegates during the Convention Debates shed any light on this question?

Despite the NSW Supreme Court's confident conclusion in *Goldring*, as explained above, there was considerable uncertainty as to whether state courts would have state jurisdiction in relation to claims for mandamus and prohibition against Commonwealth officers. Without clearly stating that there would be state jurisdiction, Symon insisted that section 75(v) had to be inserted into the clause defining the extent of Commonwealth judicial power so as to prevent that eventuality. For Symon (and at least Braddon), the insertion of section 75(v) would make the jurisdiction exclusively federal. In challenging Symon's understanding of section 75(v) in this respect, Isaacs merely hypothesised about the existence of such state jurisdiction, without stating a view.

On one view, by initially urging the striking out of the reference to mandamus and prohibition from both the clause defining the extent of judicial power and the subsequent clause allocating original and appellate jurisdiction, Barton may be taken to have considered it possible for state courts to consider such claims and for the High Court to consider the issue on appeal. There is some suggestion to this effect in his explanation of the American decisions,<sup>90</sup> although his position on this issue was far from clear. As for Inglis Clark, his only

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87 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (G Partridge & Co, 2<sup>nd</sup> ed, 1910,) 212–13; cited in *MZXOT* (2008) 233 CLR 601, 621.

88 Leslie Zines, 'Federal, Associated and Accrued Jurisdiction' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 265, 275.

89 *MZXOT* (2008) 233 CLR 601, 621 (emphasis added). Covering cl 5 largely replicates language in the Art VI.2 supremacy clause.

90 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1879.

indication came after the debates in his 1901 publication, but there is no reason to suggest that he did not have the same view when he proposed the draft clauses.

Therefore, the Convention Debates do not reveal a clear answer to this question. They do, however, suggest two possibilities, each with its difficulties. The first is that Symon's views should be seen as an indication by the framers that section 75(v) was intended to create exclusive federal jurisdiction. It seems to be accepted that '[t]he various powers conferred upon Parliament by provisions in Chapter III are necessarily exclusive of those of the state legislatures'.<sup>91</sup> Why not then the jurisdiction created by Chapter III? Of course, there are difficulties here as there are many heads of jurisdiction that would have otherwise fallen within state jurisdiction, for example, the diversity jurisdiction in section 75(iv). It might be argued that the heads of jurisdiction like sections 75(iii) and 75(v) are necessarily federal because of their express reference to the federal body politic and its officers. However, as discussed above, the larger obstacle is that Chapter III itself (in sections 77(ii) and 77(iii)) identifies the mechanism for making federal jurisdiction exclusive.<sup>92</sup>

The second possibility is that the Constitution itself, by implication, denies the possibility of State jurisdiction. In *MZXOT*, Gleeson CJ, Gummow and Hayne JJ suggested as much by saying, when referring to the operation of covering clause 5, 'that which is rendered "binding" is the federal scheme manifested in the text *and structure* of the Constitution. This includes Chapter III and *the various inferences which have been held to follow necessarily from that federal scheme*'.<sup>93</sup> It may be that their Honours are here referring to the theory of separate sovereignties referred to by Owen J in *Goldring* and which appeared to form the basis of the United States Supreme Court decision in *McClung v Silliman*. The significant obstacle, however, confronting the Court on this path is that the separate sovereignties theory formed the basis of pre-*Engineers* doctrines,<sup>94</sup> and both the theory and the doctrines were discredited in that case. Of course, federal immunities have re-emerged since the *Engineers Case*,<sup>95</sup> however, there is no attempt in the joint judgment to explain how the new principles would support the *Goldring* conclusion other than a brief appeal to federal implications.

Thus, there are difficulties in explaining why covering clause 5 should not result in state courts considering claims for mandamus and prohibition against Commonwealth officers. Although this issue may now be moot in relation to section 75(v), the same issue arises in relation to section 75(iii),<sup>96</sup> and may

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91 *MZXOT* (2008) 233 CLR 601, 618 (Gleeson CJ, Gummow and Hayne JJ).

92 It might be argued that this mechanism is available for those heads of jurisdiction which are not exclusively federal, but is unnecessary in relation to the exclusively federal heads. That would certainly give effect to what Symon thought the Judiciary Committee was trying to achieve.

93 *MZXOT* (2008) 233 CLR 601, 618 (Gleeson CJ, Gummow and Hayne JJ) (emphasis added).

94 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers Case*').

95 *Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372; *Re Residential Tenancies Tribunal of New South Wales; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

96 The joint judgment in *MZXOT* left open the question of whether there is exclusive federal jurisdiction in relation to matters arising under s 75(iii): (2000) 233 CLR 601, 621.

resurface in the future as the High Court grapples with the creation of state tribunals that exercise judicial power and can potentially consider proceedings involving the Commonwealth.<sup>97</sup>

#### D Entrenched Minimum Provision of Judicial Review

As mentioned in the introduction, five judges in *Plaintiff S 157* recognised that section 75(v) introduced ‘an entrenched minimum provision of judicial review’.<sup>98</sup> What that exactly means is unclear and has been the subject of considerable academic commentary.<sup>99</sup> Of particular interest has been the possibility that section 75(v) might prevent Parliament from adjusting the scope of executive decision-making authority so as to affect the availability of the remedies identified in section 75(v). The final observation to be explored further in this section is that the Convention Debates do not provide a clear guide for fleshing out what the High Court means by this proposition.

What is clear is that some of the delegates were concerned that the creation of jurisdiction for the Court to hear claims for mandamus and prohibition against Commonwealth officers would unsettle the established relationship between the judiciary and the executive. For example, Patrick Glynn referred to an article in the *Law Times* in which it was claimed that *Marbury v Madison* was responsible for state courts in America asserting the power to control the executive departments. Glynn then warned that ‘[w]e are putting it in the power of the Federal Judiciary to interfere with the Federal Executive, which, in America, is complained of as an unconstitutional interference with the executive departments of the state.’<sup>100</sup> Kingston shared those concerns.<sup>101</sup>

Although the contested clause at the time sought to define the extent of *judicial power*, rather than *jurisdiction* as was to be the case once the Drafting Committee reduced section 75(v) to its final form, Barton and Symon moved quickly to dispel any misconceptions. The reinsertion of mandamus and prohibition into the clause that defined the extent of Commonwealth judicial power would serve only to *create jurisdiction*. Symon said, ‘[t]he provision does not confer, and is not intended to confer ... any right whatever to interfere [with the political Executive of the Federation]. It merely gives a jurisdiction.’<sup>102</sup> The colonial courts had jurisdiction to issue mandamus and prohibition against executive officers, and all that section 75(v) did was to create federal jurisdiction in relation to Commonwealth officers.<sup>103</sup> Barton agreed that the proposal did ‘not

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97 See Geoffrey Kennett, ‘Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals’ (2009) 20 *Public Law Review* 152.

98 (2003) 211 CLR 467, 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

99 For a recent contribution see Leighton McDonald, ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law (2010) 21 *Public Law Review* 14.

100 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1876–7.

101 *Ibid* 1877.

102 *Ibid*.

103 *Ibid* 1878.

confer any right'.<sup>104</sup> Of course, as discussed above, Barton and Symon had different reasons for creating the jurisdiction, but both delegates insisted that the creation of *jurisdiction* was all that was being achieved by its reinsertion.<sup>105</sup>

As for Inglis Clark and Isaacs, neither considered that the section 75(v) forerunner added any extra jurisdiction to what would otherwise be created. Inglis Clark intended it to allocate original jurisdiction to the Court in those cases, and Isaacs thought that the changes made since Inglis Clark's draft that gave the High Court the equivalent of section 75(iii) original jurisdiction left no room for section 75(v). Thus, for those delegates, section 75(v) did not create jurisdiction.<sup>106</sup>

What does this tell us about our minimum content of judicial review? The views of Inglis Clark and Isaacs take us no further. Neither delegate saw a relevantly important role for the section 75(v) forerunner in creating jurisdiction and, in any event, their preferred designs were not adopted. As for Symon, there is a tension between, on the one hand, his confident assertions that the inclusion of the provision would not interfere with the established relationship between the judiciary and the executive and, on the other hand, the very idea that section 75(v) entrenches a limitation on Parliament. On most accounts of the entrenched minimum content, the relationship between the judiciary and the executive is somehow constitutionally immunised from alteration. However, when one remembers Symon's purpose for the section 75(v) forerunner, the tension disappears. For Symon, section 75(v) operated to protect Commonwealth officers from state jurisdiction. If Parliament chose to modify the underlying relationship between the courts and the executive so as to enhance or diminish that protection, then that was a matter for its judgment.

It is only Barton's *accountability* purpose that provides a foundation for reading in some limitations on what Parliament can do with the scope of executive power. That section 75(v) was needed to hold Commonwealth officers to account suggests a good reason for imposing at least some limitations on the Commonwealth Parliament avoiding the operation of section 75(v). However, there are two final points of caution in this respect. The first is that Barton's contributions (and those of other delegates) provide no further insight as to what those limitations might be. Not only was there some imprecision in the way that Barton presented the need to reinsert the section 75(v) forerunners, his accountability explanation was only put forward at the end of the debates on the reinsertion of the provisions without any further contributions from other delegates on the purpose of the provision. Secondly, as explained in this article, the accountability purpose was not the only one put forward during the debates.

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104 Ibid 1877.

105 The High Court seems to have accepted that s 75(v) only confers jurisdiction and is not a source of substantive rights: see in *Aala* (2000) 204 CLR 82, 139 (Hayne J).

106 As indicated above, n 41, Symon seemed to agree with Isaacs (and, by implication, Inglis Clark) that the s 75(v) forerunner was not needed to create jurisdiction. However, he nonetheless pressed for its inclusion to guarantee jurisdiction that would protect Commonwealth officers from State jurisdiction.

Importantly, Symon's protective federalist explanation seemed to have an equally important impact on the delegates' understanding of the provision.

#### IV CONCLUSION

The accountability view of section 75(v) has dominated our understanding of why section 75(v) was included in the Constitution and the way in which the High Court has seen it operating. There are certainly strong historical and normative reasons for accountability ideas to inform the way in which section 75(v) should operate. However, focusing solely on this accountability understanding can obscure some of the important features of section 75(v).

A closer consideration of the drafting history reveals and explains the symbiotic connection between sections 75(v) and 75(iii) – a connection that the High Court has assumed but not explored. Furthermore, a closer look at the drafting history reveals an equally significant federalist explanation for section 75(v) – an explanation that is yet to be properly accommodated within section 75(v). Section 75(v) has always been viewed as an important mechanism of federal constitutional government. What this article has shown is that the picture is more complex: section 75(v) has multiple layers, with each explaining the place of section 75(v) in Chapter III of the Constitution.